Supreme Court, U.S.
FILED

011377 MAR 15 2002

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

UNITED PAPERWORKERS INTERNATIONAL UNION (NOW PAPER, ALLIED-INDUSTRIAL, CHEMICAL & ENERGY WORKERS UNION), LOCAL 1737,
Petitioner,

v.

INLAND PAPERBOARD AND PACKAGING, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES B. ROBINSON
Counsel of Record
KIRCHER, ROBINSON & WELCH
1014 VINE STREET
SUITE 2520
CINCINNATI, OH 45202
(513) 381-3525

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

4388

sus
me
cor
em

QUESTION PRESENTED

Should the federal courts vacate an arbitration award aining an employee's termination for failure to be ically capable of working overtime, when the labor act expressly provides that overtime on the job of such an loyee will be assigned to others?

PARTIES TO THE PROCEEDING

Petitioner United Paperworkers International Union, Local 1737, is now Paper, Allied-Industrial, Chemical & Energy Workers Union, Local 1737.

Respondent Inland Paperboard & Packaging, Inc. is a subsidiary of Temple Inland, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

The Award Against the Union Does Not Draw Its Essence From the Collective Bargaining Agreement 5

CONCLUSION 6

APPENDIX

Appendix A
Court of Appeals Opinion, December 21, 2001 . . . . . 1a

Appendix B
District Court Opinion and Order September 12, 2000 . . . . . 9a

Appendix C
District Court Order of Judgment, July 20, 2000 . . . . . 17a

Appendix D
Arbitration Award, May 26, 1999 . . . . . 27a

TABLE OF CITED AUTHORITIES

Cases **Page**

United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987) 1,5

United Steelworkers of America vs. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 4

Statutes

28 U.S.C.§1254(l) 1
29 U.S.C. §185(a) 2

United Paperworkers International Union, Local 1737, respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit in United Paperworkers International Union, Local 1737 v. Inland Paperboard and Packaging, Inc., Case Nos. 00-6252 and 01-5010, (December 21, 2001) is unreported. It appears at 2001 LEXIS 5863 and is reproduced at Appendix A, pages 1a through 8a.

The decisions of the District Court for the Western District of Kentucky, Case No. 3:99-CV-551-H, issued on September 12, 2000 and July 20, 2000, are unreported, and are reproduced at Appendix B, pages 9a through 16a and Appendix C, pages 17a through 26a.

The decision of Arbitrator Theodore K. High, AAA Case No. 52-300-00516-98, is unreported, and is reproduced at Appendix D, pages 27a through 37a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on December 21, 2001. This Court has jurisdiction under 28 U.S.C. Section 1254(l).

STATUTORY PROVISION INVOLVED

29 U.S.C. Section 185(a) provides that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

William Anderson, the Grievant in this case, was a slitterman in the Company's Louisville plant who was off work with an injury. His doctor released him to return to work, with a specification that he work no more than eight hours a day. The Company refused to return him to work at his old job, and terminated his employment. The Union grieved the termination.

The contract provided that "(a)ny employee who returns from a leave of absence shall return to his old job..." (District Court opinion; Appendix page 9(a) at 11(a)). It also provided that "[o]vertime assignments that cannot be worked by employees because of a physical disability substantiated by medical certification will be filled in accordance with procedure...", and outlined the process by which other employees would be required to work the overtime. (District Court Opinion, App. page 9(a) at 11(a)) It is this second contract provision, providing special accommodation for employees with a particular kind of certified disability, that is fundamental in this case and required the result reached by the District Court.

This Section was brought to the Arbitrator's attention, and indeed he referred to in his opinion:

> [The Union] points out that the employees who are required to return to work subject to eight hour restrictions are accommodated. The Union takes the position that the Louisville supplement of the Collective Bargaining Agreement which provides that overtime assignments which cannot be worked by employees because of a medical certification

> will be filled in accordance with Paragraphs 11 and 12, which provide a method for filling vacancies for any overtime assignments.
>
> - Appendix, page 27(a) at 30(a)

The Arbitrator nonetheless held that, because the Grievant "could have avoided his termination" by asking for a job different from his old job, and did not do so, the Company had proper cause to terminate his employment; and denied the grievance. (Arbitrator's Opinion, Appendix, page 27(a) at 36(a)).

The District Court, while accepting all the factual findings of the Arbitrator and noting that courts rarely overturn arbitral decisions, found that the Arbitrator's decision was in direct conflict with provisions of the collective bargaining agreement. On the Company's motion for reconsideration the District Court reviewed the express requirements of the collective bargaining agreement and the absence of any language in the Agreement which could have required Anderson to seek other jobs, and held that it was required to vacate the award under United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 US 593 (1960), and the Sixth Circuit cases following that decision.

The Court of Appeals reversed, saying that "the right to return to a former position is not necessarily absolute... [It] must be construed in the context of other collective bargaining provisions; and that another provision of the contracts "requires employees to be available for overtime work as assigned or scheduled." (Court of Appeals Opinion, Appendix, page 1(a) at 6(a)). The Court of Appeals did not advert to the specific provision that overtime work for someone in Anderson's position would be worked by others.

REASON FOR GRANTING THE WRIT

The Award Against the Union Does Not Draw Its Essence From the Collective Bargaining Agreement

This Court has made it clear that "It is only when an arbitrator strays from interpretation and application of the agreement and effectively "dispenses his own brand of industrial justice" that his decision is unenforceable. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1960). Particularly in this regard, this Court has stated, "The arbitrator may not ignore the plain language of the contract". United Paperworkers International Union, AFL-CIO vs. MISCO, Inc., 484 US 29 (1987). Thus, although arbitrators enjoy considerable latitude in their interpretation of contracts, there are definite limitations to their scope of authority.

The Arbitrator, at the outset of his discussion of the case, noted the Union's position that the contractual provision about "overtime assignments which cannot be worked by employees because of a medical condition" was controlling, but failed to deal with it in his subsequent analysis. He instead dispensed his own brand of industrial justice, punishing Anderson for failure to consider other jobs. The District Court found the contract language to be both unavoidable and controlling. The Court of Appeals made no mention of it, and indeed made a completely insupportable suggestion that the contract required employees in Anderson's position to perform overtime work. This is in fact flatly contrary to what the Contract provides, and goes beyond the Arbitrator's simple imposition of his own brand of industrial justice, and into the realm of pure invention.

Petitioner submits that while vacation of a labor arbitration award is unusual and vacation of a labor arbitration award against a Union is almost unprecedented, the decision by the Court of Appeals here is so clearly contrary to this Court's opinions over the last 40 years that it should be reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued.

JAMES B. ROBINSON
KIRCHER, ROBINSON & WELCH
1014 Vine Street, Suite 2520
Cincinnati, Ohio 45202
(513) 381-3525

Attorney for Petitioner
United Paperworkers International Union
(Now Paper, Allied-Industrial, Chemical
& Energy Workers Union), Local 1727

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 00-6252 and 01-5010

[Filed December 21, 2001]

UNITED PAPERWORKERS INTERNATIONAL UNION, Local 1737,	)
Plaintiff-Appellee,	)
v.	)
INLAND PAPERBOARD AND PACKAGING, INC.,	)
Defendant-Appellant.	)

BEFORE:
CLAY and GILMAN, Circuit Judges;
and EDGAR, Chief District Judge.*

* The Honorable R. Allan Edgar, Chief United States District Judge for the Eastern district of Tennessee, sitting by designation.

OPINION BY:
R. Allan Edgar

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

OPINION:

I.

EDGAR, Chief District Judge. This appeal arises from an action to vacate an arbitration award pursuant to 29 U.S.C. §185. After conducting a hearing regarding the merits of a grievance filed by Local 1737 of the United Paperworkers International Union ("Union"), the arbitrator upheld the decision of Inland Paperboard and Packaging, Inc., ("Inland") to terminate employee William Anderson. The district court vacated the arbitrator's award, finding that it did not draw its essence from the collective bargaining agreement ("CBA") between Inland and the Union. Inland appeals the decision of the district court. For the following reasons we REVERSE.

II.

Inland produces corrugated boxes at its plant in Louisville, Kentucky. The plant operates continuously five days of the week. During those five days, the plant has three work shifts. Inland employs many individuals at its Louisville plant. About 100 of Inland's 133 employees are represented by the Union.

Prior to October 1996, William Anderson was employed at Inland as a slitterman. As a slitterman, Anderson worked on the corrugator, a machine that produces sheets of corrugated board. The slitterman is responsible for the knife and slitting operation, which must run continuously during each of the three daily eight-hour shifts.

In October 1996, Anderson injured his left foot in a motorcycle accident. As a result of his injury, he was absent from work until March 1997. Anderson then returned to his slitterman position at Inland and was assigned light duty work on a temporary basis. Inland permitted Anderson to temporarily perform light duty work believing that he would return to working at full capacity in the future.

In August 1997, Anderson had another motorcycle accident. Again he injured his left leg. Anderson then took another leave of absence from work. During this leave of absence, Inland, the Union, and Anderson discussed jobs Anderson could perform at Inland when he returned to work. Anderson insisted that he return to the slitterman job. He made it clear that he would not accept any other position.

On July 1, 1998, Anderson's doctor released him to return to work on July 6, 1998. However, the doctor restricted Anderson to working no longer than an eight-hour shift. Inland refused to allow Anderson to return to work in the slitterman position with his eight-hour work restriction. Inland required slittermen at the Louisville plant to be capable of performing overtime work. On each scheduled workday, only one slitterman is scheduled to work during each of the three eight-hour shifts. If the slitterman position is not filled, the corrugator stops running, and eventually the entire plant

shuts down. As a result, if one slitterman cannot work, the other two slittermen must each work four hours of overtime. Slittermen work significant amounts of overtime.

Anderson could not work overtime. Therefore, Inland made a good faith effort to place Anderson in another job position that did not require overtime. However, Anderson was not interested in any other position, and he did not return to work with Inland. Sometime shortly following the one-year anniversary of the date Anderson's leave of absence commenced, Inland terminated Anderson's employment for failure to return to work after a medical leave of absence.

The Union filed a grievance on Anderson's behalf and pursued it through binding arbitration. The arbitrator endorsed Inland's position that Anderson was terminable for cause under Article XIV, Section 1 of the CBA, which governs leaves of absence. The arbitrator found that Anderson's employment was terminated "automatically" when he failed to return to work after the completion of his one year medical leave of absence. The CBA also provides that employment is terminated when an employee fails to report for duty for three consecutive days. Anderson did not return to work within that time frame.

The Union then filed this lawsuit seeking to vacate the arbitration award. The district court found that the arbitrator's decision did not draw its essence from the terms of the collective bargaining agreement and vacated the arbitration award. Inland timely filed this appeal.

III.

This Court reviews the district court's vacation of the arbitrator's award *de novo*. *Tennessee Valley Auth. v. Tennessee Valley Trades & Labor Council*, 184 F.3d 510, 514 (6th Cir. 1999); *Bruce Hardwood Floors v. Southern Council of Indus. Workers*, 8 F.3d 1104, 1107 (6th Cir. 1993). However, "courts play only a limited role when asked to review the decision of an arbitrator." *Tennessee Valley Auth.*, 184 F.3d at 514. The review of an arbitration award is "one of the narrowest standards of review in all of American jurisprudence." *Id.* at 514-15 (quoting *Lattimer-Stevens Co. v. United Steelworkers*, 913 F.2d 1166, 1169 (6th Cir. 1990)).

A court must enforce an arbitrator's award as long as the award "draws its essence from the collective bargaining agreement" and is not merely the arbitrator's "own brand of industrial justice." *United Paperworkers Int'l Union v. Misco, Inc*, 484 U.S. 29, 36, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987). "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," this Court cannot overturn his decision even if convinced that the arbitrator committed serious error." *Misco*, 484 U.S. at 38; *see Major League Baseball Players Ass'n v. Garvey*, 149 L. Ed. 2d 740, U.S. 121 S. Ct. 1724, 1728 (2001). The parties to a CBA negotiate for an arbitrator's interpretation of the contract, and the Court will rarely overturn that interpretation. *Eastern Ass'n Coal Corp. v. United Mine Workers of Am., Dist.* 17, 531 U.S. 57, 62, 148 L. Ed. 2d 354, 121 S. Ct. 462 (2000).

An arbitrator's award fails to "draw its essence" from the collective bargaining agreement when the award (1) conflicts with the CBA's express terms; (2) imposes requirements on the parties that were not expressly created by the agreement; (3) is not rationally supported by or derived from the CBA; or (4) is based on general considerations of fairness and equity rather than the CBA's express terms. *Tennessee Valley Authority v. Tennessee Valley Trades & Labor Council*, 184 F.3d 510, 515 (6th Cir. 1999); *Bruce Hardwood Floors v. Southern Council of Indus. Workers*, 8 F.3d 1104, 1107 (6th Cir. 1993); *Dobbs, Inc. v. Local 614, Int'l Bhd. of Teamsters*, 813 F.2d 85, 86 (6th Cir. 1987). In the present case, the arbitrator's award did draw its essence from the CBA, and the arbitrator acted within his scope of authority under the contract.

The arbitrator's decision that Inland had just cause to terminate Anderson is logically consistent with the CBA. Under Article XIV, Section, 1, Anderson was entitled to a leave of absence because of his injured left leg. However, that provision only entitles injured employees to one year of leave time. Anderson did not report to work after the completion of his one year leave of absence. He also did not comply with Article XIII, Section 6(e), which provides that failure to report for work for three days constitutes grounds for dismissal.

The Union relies upon Article XIII, Section 7 of the CBA, which provides employees with a right to return to their

jobs with seniority after a leave of absence.[1] However, the right to return to a former position is not necessarily absolute. Section 7 must be construed in the context of other CBA provisions.

Another provision of the CBA requires employees to be available for overtime work as assigned or scheduled. The arbitrator found that the performance of overtime work is essential to the slitterman position. The ability of slittermen to work overtime is essential to the continuous functioning of the plant because of the limited number of slitterman positions. These facts are not disputed. The district court accepted the arbitrator's factual findings. Anderson could not meet the overtime requirement of the slitterman job. The arbitrator reasonably found that the CBA did not require Inland to return Anderson to a position he could not perform after his medical leave of absence.

The terms of the CBA also support the arbitrator's rejection of the Union's argument that Anderson failed to return to work only because Inland prevented him from doing so. Article XIII, Section 8 covers employees who cannot perform "arduous work" because of a physical disability. Such an employee may fill another available job with Inland or request that such a job be found. An essential function of the slitterman position is the ability to work overtime. Anderson could not fulfill that requirement. Thus, the work

---

[1] Inland contends that the Union waived the argument that Inland violated Article XIII, Section 7 by terminating Anderson's employment because the argument was not raised before the arbitrator. However, the Court need not address that issue because the arbitrator's interpretation of the CBA is consistent with Art. XII, §7.

was arduous for Anderson. Anderson not only failed to request reassignment; he also stated that he would accept no position other than slitterman. Under the circumstances, Inland did everything in its power to comply with the CBA procedures and attempted to reinstate Anderson's employment after his leave of absence.

The arbitrator neither added express terms to the CBA nor improperly based his ruling on considerations of equity. The arbitrator properly analyzed various contract provisions and came to a rational interpretation of the CBA as applied to the facts. The Court recognizes that the CBA may be susceptible to another interpretation. However, the standard of review in this case is very narrow. The arbitrator's interpretation draws its essence from the contract and is therefore entitled to deference.

IV.

The decision of the United States District Court for the Western District of Kentucky should be **REVERSED** and this case is **REMANDED** for reinstatement of the arbitration award.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:99CV-551-H

[Filed September 12, 2000]

UNITED PAPERWORKERS INTERNATIONAL UNION, Local 1737,	)
Plaintiff,	)
v.	)
INLAND PAPERBOARD AND PACKAGING, INC.,	)
Defendant.	)

MEMORANDUM AND ORDER

Defendant Inland Paperboaxd and Packaging, Inc. ("Inland") has moved the Court to alter, amend, or vacate its order entered July 19, 2000. In the Court's Memorandum Opinion issued on the same date, the Court explained why it

believed that the arbitrator's award failed to draw its essence from the Collective Bargaining Agreement (the "CBA"). The Court set forth the facts underlying this discussion in its prior opinion and will not recite them here. Everyone agrees on the applicable legal standard. Defendant disputes how the Court applied it.

Usually, courts uphold arbitrator's awards. However, "[the arbitrator's] award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960); *see also Wyandot, Inc. v. Local 227, United Food and Commercial Workers Union,* 205 F.3d 922, 929 (6th Cir. 2000). The familiar four-factors determine whether the award draws its essence from the underlying agreement. *See Tennessee Valley Auth. v. Tennessee Valley Trades & Labor Council,* 184 F.3d 510, 515 (6th Cir. 1999). Since the "draw its essence" test is disjunctive, this court must vacate the award if it meets any one of the four factors. In its first opinion, the Court focused more upon the interpretation of the CBA, rather than directly on the four factors. Therefore, the Court has carefully considered the parties' submissions, reviewed the CBA and the arbitrator's award, and paid more direct attention to the four factors. Having done so the Court reaches the same result, concluding that the arbitrator's award fails to satisfy the "draw its essence" test because it meets three of the four factors.

The award conflicts with the express terms of the agreement, the first factor, because it holds that the CBA does not "support[ ] the Grievant's claim to the job of a slitterman with a permanent eight hour restriction." Award at 8. Section 7 of Article XIII states expressly *"Any* employee who returns from a leave of absence *shall* return to his old job with seniority which shall include his period of absence" (emphasis added). This section, by its express terms, applies to any employee who returns from a leave of absence, not just those returning without a physical disability as claimed by Inland.

The award held that the full duties of the slitterman position included working for more than eight hours. The Court finds no support in the CBA for such a conclusion. In fact, this conclusion directly conflicts with the overtime provisions in the Louisville Supplement. Paragraph 14 states unequivocally: "Overtime assignments which cannot be worked by employees because of a physical disability substantiated by medical certification *will be filled* in accordance with [the] procedure outlined in paragraphs 11 and 12 above" (emphasis added). Paragraphs 11 and 12 determine how seniority controls who may and must work overtime. Nowhere do the CBA or the Louisville Supplement exempt any jobs from the express terms of Paragraph 14, nor do they provide for a company hardship or inconvenience exception to the clear procedures for filling overtime for workers with physical disabilities.

The award imposes additional requirements not expressly provided for in the agreement, the second factor, by rendering workers who cannot fulfill overtime requirements because of a physical disability ineligible for certain jobs. The CBA does not contain such an eligibility requirement but

rather states that the overtime needed for such positions will be filled by other workers. *See* CBA, Louisville Supp., ¶¶ 11-14. The arbitrator also required Anderson to consider other positions in order to return to work, a requirement not found in the CBA. Because of this extra requirement, the arbitrator did not recognize Anderson's efforts to return as slitterman as sufficient under the CBA. The CBA does not require Anderson to seek out or accept alternate positions in order to retain his CBA protections. By requiring him to do so, the award imposes a significant additional requirement on Anderson not found in the CBA. Anderson did everything required by the CBA to return to work. However well intentioned, it is impermissible for the arbitrator in effect to impose new requirements upon such an employee.

Finally, the award is based on general considerations of fairness and equity instead of the exact terms of the agreement, the fourth factor, because it is based, in part, on the hardship to the company if Anderson worked as a slitterman who could not work overtime. In addition, the arbitrator invoked equity concerns when he stated that "the Grievant could have avoided his termination by invoking his right to ask the Bargaining Committee and the Company to fmd a job for him, but he did not do so." Award at 8. These considerations, while certainly compelling evidence of the difficult position of Inland and the apparently inconsiderate behavior of Anderson, do not appear anywhere within the CBA and thus have no place in any award arising under the CBA. In his effort to bring about a fair and equitable result, the arbitrator strayed from the narrow confines of his mandate and the award thus draws its essence from ou.tside of the CBA,

Inland claims that Paragraph 14 of the Louisville supplement "does not create a right to a particular job or establish that overtime is not an essential part of some jobs" and relies on an Eleventh Circuit Americans with Disabilities Act ("ADA") case. Inland Memo, at 3 (citing *Davis v. Florida Power & Light Co.*, 205 F.3d 1301 (11th Cir. 2000)). Unlike the case at bar, the collective bargaining agreement at issue in *Davis* did not appear to have a procedure analogous to Paragraph 14 of the Louisville Supplement that expressly addressed how overtime would be filled for workers with physical disabilities. *See id.* at 1305. Furthermore, the rights and obligations of employees and employers under the ADA differ significantly from those under the CBA, the fruits of the parties bargain. This Court reviews the arbitrator's award for fidelity to the underlying agreement, not for consistency with substantive federal law and thus finds analogies to the ADA unpersuasive.

Inland also claims that Article XIII, section 8 alone, and not Article XIII, section 7 or paragraph 14 of the Louisville Supplement applies to Anderson and limits Anderson's otherwise absolute right to return to his position as slitterman. Section 8's permissive language-"may claim such open jobs"--obligates Inland to give Anderson other open jobs but does not limit his other rights under the CBA. While this section is certainly subject to varying interpretations, the express language of this section and Article XIII, section 7 and paragraph 14 of the Louisville Supplement preclude reliance on section 8 to curtail Anderson's fights to the degree urged by Inland. Again, this Court reviews the award for fidelity to the underlying agreement and Inland's argument conflicts with the express terms of the CBA and imposes additional requirements (employees *must,* not may, claim such

open jobs) not expressly provided for in the agreement.

The Court will issue an order consistent with this opinion.

/s/_____
JOHN G. HEYBURN II.
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

ENTERED: 9/12/00

District Court Memorandum and Order - 9/12/00

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:99CV-551-H

[Filed September 12, 2000]

UNITED PAPERWORKERS INTERNATIONAL UNION, Local 1737,	)
Plaintiff,	)
v.	)
INLAND PAPERBOARD AND PACKAGING, INC.,	)
Defendant.	)

ORDER

Defendant has moved to alter, amend or vacate the Court's previous order. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motion to alter or amend is DENIED.

This 11th day of September, 2000.

/s/_____
JOHN G. HEYBURN II.
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

ENTERED: 9/12/00

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:99CV-551-H

[Filed July 20, 2000]

UNITED PAPERWORKERS INTERNATIONAL UNION, Local 1737,	)
Plaintiff,	)
v.	)
INLAND PAPERBOARD AND PACKAGING, INC.,	)
Defendant.	)

MEMORANDUM AND OPINION

After an unsuccessful attempt to overturn the discharge of William Anderson before a neutral arbitrator, Plaintiff United Paperworkers International Union (the "Union") filed this lawsuit under 29 U.S.C §185 (1994), seeking reversal of

the arbitration outcome. Having carefully considered the Union's arguments to vacate or modify the decision, the Court finds that the arbitration outcome is not compatible with the agreement's express terms, and must be reversed.

Defendant Inland Paperboard and Packaging, Inc. ("Inland") manufactures corrugated cardboard boxes, and the Union represents many employees at Inland's Louisville plant, including the Grievant Anderson. The Union and Inland were parties to a collective bargaining agreement (the "CBA') during all events relevant to this case.[2] Anderson worked as a slitterman on the line, a job filled by only one worker per shift.

In October 1996, Anderson suffered a non-work-related injury, causing him to take medical leave until March 1997. At that time, Anderson returned to the slitterman position, but with the medical restriction that he could work no more than eight hours each day.[3] He remained at that

---

[2] Plaintiff and Defendant executed a larger agreement applicable at many different plants, as well as a supplement applicable only to the Louisville plant. The Court collectively refers to both documents as the CBA.

[3] The circumstances under which Inland allowed Anderson to work as a slitterman with such a restriction are contested. Inland claims the restriction was a temporary accommodation until Anderson was fully recovered. At the time, the Union filed a grievance contesting Anderson's failure to work overtime, a grievance which never fully ripened on account of Anderson's second injury. Now the Union argues that the original accommodations of an eight-hour restriction was not temporary, and that under the CBA and employee has a right not to work overtime if such a restriction is medically necessary.

position--with that restriction--until August 6, 1997, when he suffered another non-work-related injury.

This second injury precipitated another medical leave of absence, one that the parties seem to agree continued for at least eleven months.[4] In December 1997, while he was on this medical leave, Inland and Anderson had discussed the possibility of him working at other jobs in the plant, including fork lift operator, clamp truck operator, and janitor. Anderson rejected these jobs, stating that he was still medically unable to perform any job, a position ratified by his doctor's subsequent letters. As of July 6, 1998, Anderson's physician released him to return to Inland, but again with the eight-hour restriction. Inland, however, determined that, since there were only three or four other trained slitterman and three shifts to fill, it could not use Anderson in a slitterman position if he could not work overtime.

---

[4] Although it was contested at the arbitration, the parties no longer dispute that Anderson was originally on authorized medical leave and remained so until July 1998.

> Employees will be granted leaves of absence for personal...accident upon request (written application not required) up to a total period of one (1) year, provided that the employee must submit to periodic medical examinations or submit medical statements as requested by the Employer. An employee will return to work from a leave of absence for personal...accident when it is permissible on the basis of medical evidence in conformance with other provisions of the contract.

CBA, Art. XIV, 0167 §1 (1). Anderson periodically submitted medical statements during the eleven months.

On August 7, 1998, one year after Anderson's second medical leave began, Inland terminated him, ostensibly pursuant to the CBA. Inland argues that Anderson could have asked for another position--one that did not require overtime work--pursuant to the CBA.[5] It is unclear whether such an alternative job was actually offered to Anderson after his doctor cleared him to return with restriction, although there was evidence that the Union told Inland that Anderson "has no interest in anything except a slitterman's position."

If Anderson was indeed on leave for more than one year, or if he failed to report to work "without a bona fide reason," then his discharge was proper pursuant to Article XIV, §1(1) or Article VI, §2(j). But if the company prevented him from returning to work in violation of the CBA, then his discharge was unjustified. The Union filed a grievance on Anderson's behalf, and a hearing was held. Arbitrator Theodore High considered and denied the grievance, finding that Inland rightfully terminated Anderson for his failure either to return from medical leave within a year or to report to work at the conclusion of his leave. This appeal followed.

> The standard of review for arbitration awards is as familiar as it is generous:
>
> [A] court must enforce an arbitrator's award as long as it draws its essence from the collective bargaining agreement, and is not merely his own brand of industrial justice .... [A]s long as

---

[5] "Employees unable to perform arduous work because of physical disability may claim such open jobs as they are able to perform..." CBA, Art. XIII, §8.

> the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Tennessee Valley Auth. v. Tennessee Valley Trades & Labor Council, I84 F.3d 510, 515 (6th Cir. 1999) (quotations and citations omitted); see also United Paperworkers Int 'l Union v. Misco, *Inc.*, 484 U.S. 29, 37-38 (1987); *Kuhlman Elec. Corp. v. International Union, United Auto. Aerospace and Agric. Implement Workers of Amer. (UAW),* 144 F.3d 898,902 (6th Cir. 1998). The award only fails to "draw its essence" from the CBA if (l) it conflicts with the express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness or equity instead of the exact terms of the agreement. *See Tennessee Valley,* 184 F.3d at 515.

In this case, the arbitrator found as a factual matter that when Anderson was cleared to work with the eight-hour restriction, Inland offered hem alternative jobs to slitterman, and that he refused to accept them. This Court accepts that factual finding. *See Bruce Hardwood Floors v. Southern Council of Indus. Workers*, 8 F.3d 1104, 1107 (6th Cir. 1993) (*citing Misco*, 484 U.S. at 37-38). From this factual finding, the arbitrator concluded that (1) Inland could reasonably determine that its slittermen must be capable of working overtime, (2) Anderson was medically incapable of overtime, and therefore could not continue as a slitterman, and (3) Anderson's refusal to take another job at the plant warranted

his dismissal.

As the parties know, courts rarely overturn decisions of neutral arbitrators. However, in this case, the arbitrator's key findings seem to conflict directly with specific CBA provisions. For example, the arbitrator's first and second conclusions seem patently wrong. Although "Employee(s) will be required to work overtime as assigned or scheduled," CBA, Louisville Supp., ¶ 4, there is no provision in the CBA that prevents an employee from performing his job without working overtime when such an eight-hour restriction is medically prescribed. In fact, the CBA provides exactly the opposite: "Overtime assignments which cannot be worked by employees because of a physical disability substantiated by medical certification will be filled in accordance with procedure." CBA, Louisville Supp., ¶ 14. No job or position within the plant is exempted from this medical exception to required overtime, so Inland could not require Anderson to work overtime in order to retain his regular eight-hour shift slitterman position.

The arbitrator's third line of reasoning conflicts with the express terms of the CBA because it failed to consider every pertinent part of the contract. "Any employee who returns from a leave of absence shall return to bis old job with seniority which shall include his period of absence." CBA, Art. XIII, §7.[6] As Inland acknowledged from the beginning,

---

[6] *See also* CBA, Art. VI, §I ("The management of the plant and direction of the employees including the right to hire, assign and reassign to departments or divisions thereof..., are solely and exclusively the responsibility of the Employer, provided the Employer does not violate the agreement."). While Inland may generally reassign workers as necessary, it cannot violate the

Anderson was on a medical leave of absence until early July 1998. Thus, when his physician released him to full activity with an eight-hour restriction, Anderson had a right to return to his "old job." In the context of the CBA, "old job" means the employee's previous position within the plant, not his ability to work for Inland generally.[7] Therefore, on July 6, 1998, Anderson had the right to return to his position as a slitterman.

Inland's argument that Anderson was unable to perform the slitterman job as per Section 8 of Article XIII is unavailing. Anderson's physician released him to full duty for eight hours a day, so he was not "unable to perform arduous work because of physical disability." CBA, Art. XIII, §8. He was merely unable to work overtime, a medical contingency covered by Paragraph 14 of the Louisville Supplement, as discussed above. By ignoring the important, bargained-for provisions of Section 7 of Article XIII, the arbitrator's decision conflicts with the CBA's express provisions and must be reversed.

Admittedly, the circumstances here are confusing. The Court has accepted the arbitrator's factual findings. The arbitrator tried his best to achieve a just result. However, an arbitrator cannot ignore contract language in an effort to find such a just result. Defendant's actions have violated specific contract provisions, which the arbitrator apparently then failed

---

separate provision that workers returning from leave are entitled to return to their old jobs.

[7] *See, e.g.*, CBA, Art. XIII, §8 (discussing "jobs" as the various tasks available to workers within the plant).

to consider.

The Court will enter an order consistent with this Memorandum Opinion.

/s/_____
JOHN G. HEYBURN II.
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

ENTERED: 7/19/00

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:99CV-551-H

[Filed July 19, 2000]

UNITED PAPERWORKERS INTERNATIONAL UNION, Local 1737,	)
Plaintiff,	)
v.	)
INLAND PAPERBOARD AND PACKAGING, INC.,	)
Defendant.	)

ORDER

Both parties have moved for a summary judgment. Being otherwise sufficiently advised,

IT IS HEREBY ORDER ED that Defendant's motion is DENIED and Plaintiff's motion is SUSTAINED.

IT IS FURTHER ORDERED that Defendant shall immediately reinstate William Anderson to his former

position. By August 21, 2000, the parties should submit further briefs regarding back pay and Mr. Anderson's interim mitigation of damages.

This is a final Order.

This 18th day of July, 2000.

/s/_____
JOHN G. HEYBURN II.
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

ENTERED: 7/19/00

APPENDIX D

**BEFORE THEODORE K. HIGH,
IMPARTIAL ARBITRATOR**

Grievance of William Anderson

Case No. AAA 52 300 00516-98

[Filed May 26, 1999]

In the Matter of	)
Arbitration Between	)
Inland Paperboard and Packaging Inc.	)
	)
and	)
	)
PACE, Local 1737	)
	)

This case came on for hearing before Theodore K. High, Impartial Arbitrator, on March 3, 1999 at Louisville, Kentucky.

APPEARANCES

For the Company: William S. Hopson, Esq.
Wyant, Tarrant & Combs
2600 Citizen's Plaza
Louisville, Kentucky 40202

For the Union: Gerald P. Johnston
PACE
660 Northland Boulevard, Suite 25
Cincinnati, Ohio 45240

STATEMENT OF THE CASE

The Company, at its Louisville, Kentucky plant, produces corrugated boxes, brown boxes for different kinds of industries. It employs a total of 133 employees at that plant and about 100 are actually engaged in the operation of the plant and are represented by the Union. The plant operates a three shift, five week schedule. During the week it is a continuous operation. The Grievant prior to October of 1996 was a slitterman operating, the slitter portion of the corrugator. In October of 1996, the Grievant, while riding his motorcycle off the job, collided with a van, with the result that he received an injury to his left foot. He was off work for some period of time, but in March of 1997 he returned to his original position, but on a temporary basis on light duty. In August of 1997, the Grievant, while again operating a motorcycle off the job with his wife, swerved to avoid a dog and had an accident. The result of the accident was another injury to his left leg. Thereafter he was off for an extended period of time and even, at one point, applied for disability retirement, but didn't complete the process. During that time off, discussions were held between the Grievant, the Union and the Company with respect to jobs that the Grievant could do. The Grievant insisted that he return only to the position that he had held in operating the slitter. Because the doctor's permission to return to work was with the restriction that the Grievant be required to work no more than eight hours, the Company said that it could not accommodate him.

Because there were few replacements and because of the necessity of overtime, from time to time, on the corrugator, the Company was then unable to bring the Grievant back once he had gotten a certificate to return to work, upon which was placed an eight hour limit by the doctor. Therefore, the Grievant remained upon a leave of absence for one year. At the end of the year the Company, pursuant to provisions of the Collective Bargaining Agreement, advised the Grievant that he had failed to return from a disability leave of absence and was, therefore, separated from employment. This action on the part of the Company resulted in the instant grievance which the parties have been unable to resolve and which is before the Arbitrator for disposition.

ISSUE

The issue for disposition is whether the Grievant's employment was terminated for proper cause and, if not, what shall the remedy be?

DISCUSSION

The Company's position is that the Grievant, having begun a leave of absence following his second motorcycle accident in August of 1997, was subject to Article XIV, Section 1 of the Collective Bargaining Agreement which provides for employees being granted leaves of absence for personal illness or accident, "up to a total period of one (1) year, provided that the employee must submit two periodic medical examinations or submit medical statements as required by the Employer," The Company indicated that the Grievant's employment was terminated, in its phrase,

"automatically" when the Grievant failed to return after the completion of the one year leave of absence or otherwise notify the Company of his then current circumstances. The Collective Bargaining Agreement also provides that when an employee fails to report for duty and fails to call off for three consecutive days, that employee's employment is terminated.

The Union's position is that the Grievant, who was off the job for reasons beyond his control (the motorcycle accident), should not be considered on medical leave subject to the termination of his employment which has, in fact, occurred. It points out that the employees who are required to return to work, subject to eight hour restrictions are accommodated. The Union takes the position that the Louisville supplement of the Collective Bargaining Agreement which provides that overtime assignments which cannot be worked by employees because of a medical certification will be filled in accordance with Paragraphs 11 and 12, which provide a method for filling vacancies for any overtime assignments.

The Union's position also is that the Grievant was actually laid-off, rather than on a disability illness leave. In support of this position, the Union adduced evidence to the effect that the Grievant had been paid unemployment compensation.

Finally, the Union's position is that the failure of the Grievant to return to the workforce was because of the Company's actions in failing to permit him to return to work. It argues that since Article XIII, Section 6, Paragraph 187 of the Collective Bargaining Agreement provides failure to return from an authorized leave of absence without good

cause, causes the employee to lose seniority. It argues that what better cause could there be for failing to return then the Employer's not permitting him to return to work.

The Union's position with respect to the Company's failure to permit the Grievant to return to work has to do with the Company's position that the slitterman was a job which required overtime and was without sufficient replacements to allow production to proceed. The Union's position is that the Grievant could have been returned to work on the slitter as a slitterman with the eight hour restrictions before his leave expired.

The Company introduced evidence to the effect that if the slitterman position is not filled, the corrugator stops running and, eventually, the entire plant goes down. Thus, if a slitterman on one shift cannot work, the two other slitterman must each work four hours overtime unless someone else can cover the shift. The Plant Manager testified that in 1998 there were only four employees in addition to the Grievant (three of which were assigned to each of the shifts) who were qualified as slitterman. The Plant Manager testified that if the Grievant could not perform the slitterman's job, including its overtime requirements, he was not able to return to work to perform the slitterman's job.

The Union argues that the Company did, in fact, accommodate the Grievant after his first motorcycle accident after he was cleared to return to work, with an eight hour restriction, and permitted the Grievant to work with an eight hour restriction as a slitterman and was so working at the time of his second motorcycle accident.

The Company's evidence is that the Grievant could have exercised his right under the Collective Bargaining Agreement for the Company to find him a job which he could perform. The Grievant not only did not do so, but rejected the possibility of other jobs the Company contends that he could have performed and indicated, according to the Plant Manager, that the Grievant would only return to work if he was placed in the slitterman's position.

I am unable to accept the Union's argument that the Grievant was on layoff, because he had received unemployment compensation benefits during the period of the time in question. The Company points to KRS §341.420(5) of the Kentucky statues, which provides:

> "... no finding of fact or law, judgment, conclusion, or final order made with respect to the claim for unemployment compensation may be conclusive or binding in any separate or subsequent action or proceeding in another form except proceedings under this Chapter, regardless of whether the prior action was between the same or related parties were involved in the same facts."

Therefore, I cannot consider the fact that payment of unemployment compensation benefits were made to be conclusive with respect to the Grievant's status during the period in question. To the contrary, it appears that the Grievant recognized that he was on a medical leave when he periodically brought in doctor statements to the Company during his leave as required by the Collective Bargaining Agreement. The Company listed the Grievant on its medical

leave weekly crew lists as being on medical leave.

In view of the foregoing, I must conclude that the state of the Grievant's status in the period between the second motorcycle accident and the time that his employment was terminated, was on a medical leave, as provided for in Article XIV, instead of on layoff as the Union argues. Thus, I am unable to accept the Union's argument that the Grievant must be laid-off for two years before losing his seniority rights, in view of the fact that I have found that the Grievant was, in fact, on a medical disability leave.

The Union argues that the Company did not enforce Article XIII, Section 8. It bases this upon the questions of Company witnesses as to whether the Grievant was scheduled back into the plant on any job to which questions the witnesses responded, "no." This Section of the Collective Bargaining Agreement provides that employees who are unable to perform arduous work because of a physical disability may claim such open jobs as they are able to perform, provided they furnish a doctor's certificate of a substantial disability. The evidence shows, however, that the Grievant was, in fact, offered other jobs, or at least return to work doing other jobs than the slitterman and that the Grievant made it clear that he was going to accept no other job than that of slitterman.

The Union argues that pictures of forklifts which were introduced in evidence by the Company have no relevance to the case, for the reason that the Company did not schedule the Grievant on either of these jobs to see if he could perform them. In addition, the Company thought that the Grievant might be able to do the job of truck driver. This evidence

buttresses the Company's position that it made a good faith offer to the Grievant to place him in other jobs which he could perform and which did not have the requirement of overtime that the slitterman's job did. These were jobs which were performed by other employees, unlike the slitterman on a given shift. Thus, as we have seen, all this became moot when the Grievant made it clear that he would not accept any of these jobs or any other job, except the job of slitterman. The Company witnesses' testimony on this point is unrebutted, since the Grievant did not take the stand to testify.

The Union protests that the Company did not give the Grievant the opportunity to perform the job of slitterman, as it did after the first motorcycle accident. The evidence shows, however, that the reason the Company did not allow him to perform his job, subject to the eight hour restriction, was that, unlike the period between the first and second motorcycle accident where the Grievant was performing it on a temporary basis with the expectation that he would be able to resume his slitterman job without restrictions, there was, in fact, no medical reason advanced that he could perform the job for more then eight hours at some time in the future. Thus, after the second motorcycle accident the Company was not looking at a temporary circumstance, but looking toward a resumption of full duties. Instead, the severe injuries the Grievant received to his leg and the medical information provided by doctors about it, did not suggest any point in the future at which the Grievant might resume his full duties as slitterman.

The Union introduced the testimony of a former employee named John Smith who testified that he was permitted to select a job of his choice and worked six years under an eight hour restriction until his retirement. The

Company's evidence is to the effect that during the time period in Mr. Smith's testimony there were six other people who were trained to do the slitterman job. Article XIII, Section 8 provides that the employee may request the Bargaining Committee and the Company to find him a job. The evidence shows that the management and the Bargaining Committee attempted to do this, but the Grievant refused to consider any other job. Paragraph 14 of the Legal Supplement to the Collective Bargaining Agreement contains the provision for filling overtime assignments that cannot be worked because of physical disabilities. I find that neither of these two contractual provisions supports the Grievant's claim to the job of a slitterman with a permanent eight hour restriction.

The Union makes the argument that the Grievant was disabled and, therefore, that disability should be accommodated. The cases, however, interpreting the Americans with Disabilities Act do not support its position. Thus, an inability to work overtime has been found not to be a handicap within the meaning of the Act. *See, Brennan vs. National Telephone Directory Corporation*, 850 F.Supp. 331,343; *Loft vs. Luthern General Hospital*, 57 F.3d. 1446, 1454-55. The evidence demonstrates that an essential ingredient of the slitterman's job is the ability to work overtime. Because there is only one slitterman and it is a critical part of the operation of the corrugator, it is a critical part of the production of the plant. The Plant Manager testified that if the slitterman's position is not filled, the corrugator stops running, and, eventually, the entire plant goes down. In any case, a claim of a violation of the Americans with Disabilities Act should be litigated in another forum.

I am in agreement with the Company that the Grievant could have avoided this termination by invoking his right to ask the Bargaining Committee and the Company to find a job for him, but he did not do so. In view of the foregoing, it is my conclusion that the Company had proper cause to terminate the employment of the Grievant both because he failed to return from his disability leave within one year, (*see* e.g., in re: *Altuna Hospital*, 102 LA 650,652; in re: *Agden Allied Plant Maintenance Company*, 101 LA 467,470) and the additional ground that the Grievant failed to report for duty or call off during three days following the expiration of his leave of absence. For both of the foregoing reasons, it is my conclusion that the Company had proper cause to terminate the Grievant's employment.

It follows that the Grievance is not well made and should be denied.

A copy of a charge form filed with the National Labor Relations Board (NLRA) in Case No. 9-CA 36431-001 was introduced into evidence, alleging a violation of the NLRA because of Grievant's discharge due to this protected concerted activities. There is no evidence in the record that the NLRB has deferred to this arbitration proceeding. In any case, there is no evidence before me of any discrimination in the Grievant's separation from employment was because of any protected concerted activity, as that term is defined in the NLRA.

AWARD

Grievance denied.

/s/ _____
Theodore K. High, Impartial Arbitrator

Dated: May 26, 1999